



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Milwaukee Enrollment Services, Petitioner

vs.

DECISION

Case #: FOF - 155304

██████████, Respondent

Pursuant to petition filed February 7, 2014, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee Enrollment Services to disqualify ██████████ from receiving FoodShare benefits (FS) for one year, a hearing was held on Tuesday, March 25, 2014 at 11:00 AM, at Milwaukee, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

Respondent:

██████████
████████████████████
████████████████████

I

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) is a resident of NA who received FS benefits in Milwaukee County from September 1, 2012 through December 30, 2013.
2. On January 24, 2012, the respondent completed a FS review. He reported he was a resident of Wisconsin and he intended to remain in Wisconsin. He did not report receiving benefits from another state. On

February 3, 2012, the agency issued a Notice of Decision informing the respondent that he would continue to receive \$200/month in FS benefits.

3. On February 15, 2012, the agency received an email that indicated the respondent applied for benefits in the state of Mississippi. On February 17, 2012, the respondent's Wisconsin FS case was closed.
4. On March 5, 2012, the respondent reapplied for Wisconsin FS benefits. He reported it was unknown if he was receiving benefits in another state. On March 6, 2012, the agency approved expedited FS benefits. On March 6, 2012, the agency also received an email from Mississippi verifying that he did not have an open case in Mississippi.
5. On July 1, 2012, the respondent started working at [REDACTED] in South Dakota.
6. On July 23, 2012, the respondent completed a FS renewal reporting that he lives in Wisconsin. On July 25, 2012, the agency issued a Notice of Decision informing the respondent that he would continue to receive \$200/month.
7. The respondent work at [REDACTED] in South Dakota from August 29, 2012 – December 8, 2012.
8. On February 18, 2013, the agency issued a Notice of Decision informing the respondent that he would continue to receive \$200/month.
9. On April 1, 2013, the respondent started working at Performance Pet Products in South Dakota.
10. On November 12, 2013, the respondent submitted a renewal reporting he is homeless. On November 13, 2013, the agency issued a Notice of Decision informing the respondent that he would receive \$113 in FS benefits for November, 2013 and \$189/month effective December 1, 2013.
11. All of respondent's FS benefits were used in South Dakota from July 22, 2012 – December 8, 2013.
12. Respondent registered to vote in South Dakota.
13. Respondent's cell phone number has a South Dakota area code.
14. On February 14, 2014, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent made misrepresentations or concealed facts to receive FS benefits.
15. The respondent failed to appear for the scheduled March 25, 2014 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 49.795(2-7).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the opposite is true.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*,

208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The agency presented sufficient evidence to meet its burden to show by clear and convincing evidence that respondent committed an IPV. The respondent repeatedly reported to the agency that he resided in Wisconsin. The evidence clearly establishes that he resided in South Dakota. Specifically, all of the respondent's FS benefits were used in South Dakota between July, 2012 and December, 2013. Respondent registered to vote in South Dakota. He was employed by several employers in South Dakota. His cell phone number had a South Dakota area code. In addition, the agency produced evidence that the respondent's MA benefits were never used in Wisconsin. Further, credit reports reflect that the respondent was living in South Dakota for the pertinent time period.

The agency testified that it contacted the respondent by phone in December, 2013. The respondent continued to deny his residency in South Dakota and claimed to live in Milwaukee. He reported that the agency has the wrong person. He also reported that his mom is ill and he travels back and forth to South Dakota to help her. He conceded working in South Dakota but stated it was temporary. The respondent refused to give the agency his South Dakota address. The respondent did not appear at the hearing and there is no evidence to support the position he raised with the agency.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that misrepresenting eligibility to receive FS benefits.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN

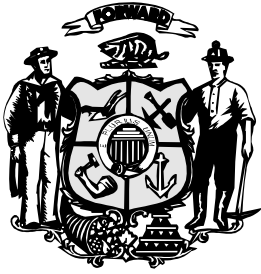
INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 23rd day of April, 2014

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

c: Miles - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Pamela Hazley - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on April 23, 2014.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
Pamela.Hazley@dhs.wisconsin.gov